OOI CHEW SENG

v.

ULTRATECH SDN BHD & ORS

HIGH COURT MALAYA, KOTA BHARU
NIK HASHIM JC
[ORIGINATING SUMMONS NO: 24-199-1994]
12 DECEMBER 1996

CIVIL PROCEDURE: *Preliminary objection - Notice to opponent - Whether prior notice required - Whether notice given a day before hearing sufficient*

CIVIL PROCEDURE: *Appeal - Notice of - Whether unsealed undated and unsigned notice valid - Meaning of "issued" - Whether service of unsealed notice effective - Whether adjournment of hearing extended date of service - Rules of the High Court O. 56 rr. 1(2), (3)*

The applicant appealed against the decision of the Senior Assistant Registrar, wherein he allowed the respondents' application to strike out the applicant's claim. Before the hearing of the appeal, the respondents raised a preliminary objection, that they were not served with a sealed copy of the notice of appeal, two clear days before the date of the hearing of the appeal. It was submitted, that the appeal was not properly brought before the court being in contravention of O. 56 r. 1(3) of the Rules of the High Court ('RHC'). The appellant contended that the notice of appeal, dated 24 March, was duly served well within time; and for the purpose of satisfying O. 56 r. 1(3) of the RHC, the respondents need not be served with a sealed copy of the notice of appeal. It was further argued on behalf of the appellant, that the date of the hearing being adjourned, it had the effect of extending the date of service. In addition, the appellant complained that he had not been given due notice of the proposed objection, and argued that an affidavit of evidence in support of the objection was needed.

Held:

[1] It is a good practice for a party intending to raise a preliminary objection, to do so by giving prior notice. It is not the law that the absence of prior notice will totally shut the door, for the intended objector, from raising the objection.

[1a] In the present case, there was prior notice given a day before the hearing of appeal, that the respondents would be raising a preliminary objection. Hence the procedural requirement of giving the other side notice, at the earliest possible moment had been satisfied.

[1b] The affidavit evidence in support of the objection was not necessary as the prior notice of the preliminary objection was sufficient.

[2] A notice of appeal is valid in law only if it is "issued". Under O. 56 r. 1(3) of the RHC, "issued" would be, when such notice is signed, sealed and dated, and it is then deemed to be "issued". It is also on that date that the court must construe that it was "issued".

[2a] In the instant case, the notice of appeal which was served on the respondent, on 13 April 1996, was not sealed, dated and signed by the Senior Assistant Registrar ('SAR'). The date for the hearing of the appeal was also not fixed. The notice was filed in court on 24 March 1996 and it was issued out by the court on the same date but it was not this sealed copy that was served on the respondents. Until the notice was signed, sealed and dated by the SAR, as required in Form 114, the notice of appeal could not be said to be a valid notice of appeal, pursuant to O. 56 rr. 1(2), (3) of the RHC.

[3] Order 56 r.1(3) of the RHC prescribes that service of the notice has to be effected, two clear days before the return day for hearing the application. In the matter at hand, the notice was issued within the prescribed five days after the judgment, as required by the first limb of O. 56 r. 1(3) but the requirement of the second limb was not met.

[4] The adjournments of hearing of appeal do not have the effect of extending the date of service of the notice. As was in this case, the proper notice was not served, until 21 days after the hearing of the application. The adjournment of the hearing, did not have the effect of extending the date of service of the valid notice of the appeal.

[5] The provisions of O. 56 r. 1(3) RHC are mandatory. It is the duty of the party who wishes to appeal to comply with them strictly. In the matter before the court, the notice of appeal that was served within time was not valid for lack of legal authority, while the valid one was served outside the prescribed period. Therefore it was ruled that the appeal could not be said to have been brought properly before the court.

[Appeal struck off with costs.]

Cases referred to:
Chern Yen Ming v. Teng 1k Ngee Construction Sdn Bhd [1996] 1 CLJ 571 ***(foll)***
Datuk Bandar Kuala Lumpur v. Seman bin Amat & 2 Other Cases [1996] 3 CLJ 263 ***(refd)***
Gurbachan Singh v. Seagrott & Campbell (No 2) [1962] 28 MLJ 370 ***(refd)***
Jasabena Sdn Bhd v. Beh Heng Poo & Anor [1985] 1 MLJ 394 ***(refd)***
Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 ***(refd)***
Public Feedmill (M) Sdn Bhd v. Hai Yeu Hin [1994] 2 CLJ 802 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19, O. 56 rr. 1(2), (3)

For the appellant - Dato' Wan Mustapha Wan Ali; M/s Wan Mustapha & Co
For the respondent - S Maniarasan; M/s Nazri Aziz & Wong

Reported by Michele Saw

JUDGMENT

Nik Hashim JC:

This is an appeal to the judge in chambers against the decision of the Senior Assistant Registrar (SAR) on 19 March 1996 wherein he allowed the application by respondents 2 and 5 to strike out the appellant's claim against them under O. 18 r. 19 Rules of the High Court 1980 ('RHC')

Before hearing the appeal, Encik S. Maniarasan, learned counsel for the respondents raised a preliminary objection that the respondents were not served with a sealed copy of the notice of appeal 2 clear days before 29 October 1996, the day fixed for hearing of the appeal; and what was served on 13 April 1996 was a notice of appeal without seal, undated and unsigned by the Registrar and as such, he submitted that the appeal is not properly brought before the Court being in contravention of O. 56 r 1(3) of the RHC.

Dato' Wan Mustapha bin Wan Ali, learned counsel for the appellant, on the other hand, argued that the notice of appeal dated 24 March 1996 was duly served on the respondents on 13 April 1996 well within time. He further complained that he was not given due notice of the proposed objection.

After hearing their submissions which I shall revert to them later, I was left with the thought that since the notice of appeal itself is a question of fact and that there is no affidavit evidence in support of the objection, I requested both counsel to address me further whether I could entertain the objection based on the statements from the bar, and adjourned the case to another date.

At the continued hearing, Encik S. Maniarasan responded that the objection taken was on a point of law in that O. 56 r. 1(3) was breached by the appellant for failing to serve a sealed copy of the notice of appeal within time and according to him, the affidavit evidence in support of the objection was therefore not necessary. He contended that the burden to prove service of a sealed copy of the notice of appeal is on the appellant.

Dato' Wan Mustapha replied that affidavit evidence in support of the objection is needed and that since the respondents had failed to file one, the burden to prove service of the notice of appeal does not arise.

What is clear from the decided cases is the need for prior notice of the preliminary objection. The rational behind the need for prior notice is to prevent surprise. It has been said that it is a good practice for a party intending to raise a preliminary objection to do so by giving prior notice. (See *Datuk Bandar Kuala Lumpur v. Seman bin Amat & 2 other cases* [1996] 3 CLJ 263). Thomson CJ in *Gurbachan Singh v. Seagrott & Campbell* (No. 2) [1962] 28 MLJ 370 at p. 371 said:

> Before departing from the case I should observe that the procedure followed by the repondents, that is to say giving the other side notice at the earliest possible moment and then dealing with the matter when the appeal comes on for hearing seems to be the course that was followed and certainly not disapproved of in the case of In re Helsby (1894) 1 QB 742.

However, it is not the law that the absence of prior notice will totally shut the door for the intended objector from raising the objection. In *Jasabena Sdn. Bhd. v Beh Heng Poo & Anor* [1985] 1 MLJ 394, even though no prior notice was given, the Court heard the preliminary objection of the respondent, but for lack of merit the Court dismissed the objection raised.

In the case before me, there was a prior notice. A day before the hearing of appeal that is on 18 November 1996, the respondents' solicitor had sent a notice by fax to the appellant's counsel indicating that among other things:

> We shall be raising a preliminary objection on the ground that your service of the notice of appeal on us is improper.

In my view, the notice was good, and the procedural requirement of giving the other side notice at the earliest possible moment had been satisfied in this case. It seems that prior notice is the only requirement that is needed before a preliminary objection is raised. Since a notice was given and the disputed unsealed copy of the notice of appeal was made available before the Court, I hold that the need for an affidavit evidence in support as posed by me earlier is therefore not necessary. A prior notice of the preliminary objection is

sufficient. As prior notice was given to the appellant in this case, he could not be heard to say that he was caught by surprise by the preliminary objection of the respondents.

It is not in dispute that the unsealed copy of the notice of appeal was served on the respondents on 13 April 1996. Dato' Wan Mustapha argued that for the purpose of satisfying O. 56 r. 1(3) of the RHC, the respondents need not be served with a sealed notice of appeal. He submitted that service with an unsealed copy is good enough.

O. 56 r. 1 of the RHC states that:

(1) An appeal shall lie to a judge in chambers from any judgment, order or decision of the Registrar.

(2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice in Form 114 to attend before the judge on a day specified in the notice.

(3) Unless the court otherwise order, the notice must be issued within 5 days after the judgment, order or decision appealed against was given or made and served not less that 2 clear days before the day fixed for hearing the appeal.

Before a notice of appeal can be said to be valid in law, it has to be issued. What does the word 'issued' mean under O. 56 r. 1(3) of the RHC? YA Abdul Malik Ishak J in *Chern Yen Ming v. Teng Ik Ngee Construction Sdn. Bhd.* [1996] 4 MLJ 227 at p. 321 said:

> Now, even though the words like 'signed, sealed and dated' do not appear in O. 56 r. 1(3) of the RHC, yet on perusal of Form 114, I venture to say that in construing the meaning of the word 'issued' the usual salutations of 'signed, sealed and dated' should be attached to it, after all the word 'seal' appears at the bottom portion of Form 114 just above the word 'registrar'.

He continued to say at the same page:

> ... and to construe the meaning of the word 'issued' under O. 56 r. 1(3) of the RHC it would be when the notice of appeal to the judge in chambers is actually signed, sealed and dated and when such notice is signed, sealed and dated then it is deemed to be issued and it is on that date that the Court must construe that it was issued.

With respect, I am in agreement with the learned judge on the interpretation of the word 'issued' under O. 56 r. 1 (3) of RHC. In the instant case, the notice of appeal which was served on the respondents on 13 April 1996 was not sealed, dated and signed by the registrar. Neither the date for the hearing of the appeal before the judge in chambers was fixed in that notice. The notice was filed in court on 24 March 1996, and it was issued out by the court also dated on 24 March 1996. But it is significant to note that it was not the notice which was issued and dated 24 March 1996 that was served on the respondents. What was served on 13 April 1996 was a 'blank' notice of appeal which was unsealed, undated and unsigned by the registrar. Until the notice is signed, sealed and dated by the registrar of the High Court as required in Form 114, the notice of appeal, in my view, cannot be said to be a valid notice of appeal clothed with the legal authority of being issued pursuant to O. 56 r. 1(2) and (3) of the RHC (see *Perbadanan Nasional Insurans Sdn. Bhd. v. Pua Lai Ong* [1996] 3 CLJ 321. In my judgment, the notice of appeal that was served on 13 April 1996 is not a valid notice of appeal. It was not issued by the court. The notice was prematurely served. Service with an invalid notice of appeal cannot be considered a valid service.

It was also not in dispute that the sealed copy of the notice of appeal was only served on the respondents on 16 November 1996 well after the first date of hearing of the appeal which was fixed on 29 October 1996. On 29 October 1996, however, at the request of the appellant, the hearing of the appeal was adjourned to 19 November 1996.

Order 56 r. 1(3) of the RHC prescribes that service of the notice has to be effected 2 clear days before the returnable day for hearing the appeal. In this case, whilst the notice was issued as required by the first limb of O. 56 r. 1(3) within the prescribed 5 days after the judgment, the requirement of the second limb was not met.

YA VC George in *Public Feedmill (M) Sdn. Bhd. v. Hai Yeu Hin* [1994] 2 MLJ 34, on the issue whether the adjournment of hearing of appeal had the effect of extending the date of service of the notice of appeal, had this to say at p. 39:

> The two adjournments of the date of hearing of the appeal has not the effect of nullifying the notice that had been issued on 13 April and per se does not have the effect of extending the date of service of the notice.

With respect, I agree with the learned judge. The same principle applies here. In this case, the proper notice was not served until 16 November 1996, that is 21 days after 29 October 1996, the date fixed for hearing the appeal. In the event, I hold that the adjournment of the hearing of the appeal to

19 November 1996 similarly, does not have the effect of extending the date of service of the valid notice of the appeal.

The provisions of O. 56 r. 1(3) of the RHC are mandatory, and it is the duty of the party who wishes to appeal to comply with them strictly. In the case before me, the notice of appeal that was served within time was not valid for lack of legal authority, while the valid one was served outside the prescribed period. Accordingly, I rule that the appeal cannot be said to have been brought properly before the court, and as such on the preliminary objection, the appeal to the judge in chambers is struck off with costs.